88-1860

Supreme Court, U.S.
FILED
APR 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1988

PING L. KU,

Petitioner,

v.

ALLIED-SIGNAL, INC.,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Counsel of Record

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-3134

PING L. KU

Plaintiff - Appellant

ALLIED-SIGNAL INC.

Defendant - Appellee

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. James R. Spencer, District Judge. (C/A No. 87-0567)

Submitted: November 30, 1988 Decided: December 30, 1988

Before ERVIN and WILKINS, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Ping L. Ku, Appellant Pro Se. Donald Lester Creach, Thomas J. Flaherty (HUNTON & WILLIAMS) for Appellee.

PER CURIAM:

Ping L. Ku appeals from the district court's order denying relief under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. Our review of the record and the district court's opinion discloses that this appeal is without merit. Accordingly, we affirm on the reasoning of the district court. Ku v. Allied-Signal Inc., C/A No. 87-0567 (E.D. Va. July 20, 1988). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED

No. 88-3134 Feb-3 1989

U.S. Court of Appeals

Fourth Circuit

Ping L. Ku,

Plaintiff - Appellant,

v.

Allied-Signal, Inc.,

Defendant - Appellee.

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's pro se petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Senior Judge Butzner, with the concurrence of Judge Ervin and Judge Wilkins.

For the Court

JOHN M. GREACEN
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

FILED
JUL 20 1988

PING L. KU,	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 87-
v.	)	0567-R
	)	
ALLIED-SIGNAL, INC.,	)	
	)	
Defendant.	)	

FINAL ORDER

For reasons stated in the accompanying Memorandum, the defendant's motion for summary judgment is GRANTED, and JUDGMENT is hereby ENTERED in favor of the defendant.

As this is a Final Order from which an appeal will lie, plaintiff is ADVISED that if he chooses to appeal he must file a notice of appeal with the Clerk of the Court within thirty (30) days of the date of this Order.

And it is so ORDERED.

/s/James R. Spencer
UNITED STATES DISTRICT JUDGE

Date: JUL 20 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

FILED
JUL 20 1988

PING L. KU,	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 87-
v.	)	0567-R
	)	
ALLIED-SIGNAL, INC.,	)	
	)	
Defendant.	)	

MEMORANDUM

This matter comes before the Court on defendant's motion for summary judgment. The motion has been fully briefed by the parties and is now ripe for decision. For reasons stated below, the motion for summary judgment will be GRANTED.

Background

Plaintiff Ping L. Ku ("Ku"), who is of Asian/Chinese origin, was hired by defendant Allied-Signal Inc. ("Allied") as a Research Specialist III, Grade 11, in the Home Furnishings Department of the Fibers Division, on February 11, 1985. Ku's immediate supervisor at the Petersburg location was Charlie

Cole ("Cole"), the Manager of the Applied Research Group. Alan Francario ("Francario"), the Manager of Product Development, supervised Cole until Ed Duffy ("Duffy") took over sometime in 1985. Ray Biron ("Biron"), the Director of Technical and Commercial Development, supervised Francario and Duffy.

In late 1985, Allied implemented a census/cost reduction program aimed at identifying positions in the corporation which could be eliminated. Biron identified Ku's position as one which could be eliminated. On December 12, 1988, Duffy and Cole informed Ku of this development. Ku was given the option of receiving additional notice and severance pay, or additional credit toward a pension, and selected the latter. He currently receives a pension of approximately $600 per month.

Ku's employment with Allied ended on January 31, 1986. He subsequently filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), claiming that he was discharged on account of his race. Having received a

Notice of Right to Sue from the EEOC, Ku brought the instant suit, alleging a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et. seq.

Legal Standards

The United States Supreme Court has recently discussed the standard to be applied by District Courts when considering motions for summary judgment.

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex Corp. v. Catrett, _____ U.S. _____, _____,

106 S.Ct. 2548, 2552-53 (1986) (quoting Fed. R. Civ. P. 56 (c)).

The use of summary judgment in discrimination cases must be used sparingly and approached with extreme caution. Powers v. Dole, 782 F.2d 689, 694 (7th Cir. 1986). This is so because discrimination cases often involve issues of intent and motive. Kephart v. Institute of Gas Technology, 630 F.2d 1217, 1218 (7th Cir. 1980), cert. denied, 450 U.S. 959 (1981). Some cases, however, are appropriate for summary judgment. The United States Court of Appeals for the Fourth Circuit has stated:

> Care is required in deciding whether the evidence presents a genuine issue of motive, for "summary judgment is seldom appropriate in cases wherein particular states of mind are decisive as elements of [a] claim or defense." Charbonnages de France v. Smith, 597 F.2d 406, 414 (4th Cir. 1979). Resolution of questions of intent often depends upon "the credibility of the witnesses, which can best be determined by the trier of facts after observation of the demeanor of the witnesses during direct and cross-examination." Morrison v. Nissan Motor Co., Ltd., 601 F.2d 139, 141 (4th Cir. 1979). We do not suggest, however, that summary judgment has no role in Title VII litiga-

> tion. "The fact that motive is often the critical issue in employment discrimination cases does not mean that summary judgment is never an appropriate vehicle for resolution." International Woodworkers of America v. Chesapeake Bay Plywood Corp., 659 F.2d 1259, 1272 (4th Cir. 1981) (emphasis in original). Unsupported allegations as to motive do not confer talismanic immunity from Rule 56.

Ross v. Communications Satellite Corp., 759 F.2d 355, 364-65 (4th Cir. 1985).

The analysis a court is to follow in Title VII cases was set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). This analysis is also appropriate when a court considers a motion for summary judgment. Everett v. Comsat, 33 F.E.P. Cases 793, 796 (D.D.C. 1983). The plaintiff has the initial burden of establishing a prima facie case of discrimination. Ordinarily in discharge cases the plaintiff must show that he is a member of the protected class, that he was discharged, that he was performing satisfactorily, and that he was replaced by someone outside the protected class. Goldberg v. B. Green & Co., 836 F.2d 845, 849 (4th Cir. 1988).

However, in reduction-in-force situations a more appropriate scenario requires the plaintiff to show that he is in the protected class, that he was qualified to assume another position at the time of his discharge, and that the defendant either (a) consciously refused to consider retaining plaintiff because of his race, or (b) regarded plaintiff's race as a negative factor in such consideration. Fink v. Western Electric Co., 708 F.2d 909, 915, (4th Cir. 1983); Williams v. General Motors Corp., 656 F.2d 120, 129-30 (5th Cir.), cert. denied 455 U.S. 943 (1982).

Nevertheless, once the plaintiff has established a prima facie case, the defendant must articulate a non-discriminatory reason for its actions. Thereafter, the plaintiff must show that the defendant's justification was a mere pretext for discrimination. McDonnell Douglas, 411 U.S. at 802-04.

Discussion[1]

It is a given that Ku is a member of the protected class and that he was discharged. While his qualifications to hold that position or to fill another have been questioned, the Court need not focus on that issue. The final element, that race was a consideration in the defendant's conduct, will be explored.

Ku's argument in this regard can be traced to four main points. First, Ku was the only non-white salaried employee in his department. Second, he argues that the timeliness of his evaluation, coming shortly before his discharge, is indicative of a discriminatory plot or conspiracy. Third, Ku states that he never received any negative feedback concerning his work prior to the aforementioned

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[1] Allied argues that Ku did not timely file a charge with the EEOC, a fact which, if true, would bar suit in this Court. Inasmuch as the Court concludes that Ku has presented no evidence to substantiate a charge of race discrimination, the timeliness argument need not be addressed.

evaluation. Fourth, Ku argues that the evaluation was inaccurate and unfair.

From these points, Ku asks this Court to draw the inference that his race was a factor in the defendant's decision to eliminate his position. They will be discussed below. It is undisputed that Ku was the only non-white in the department. It is likewise and undisputed that Ku was the only Asian to be included among the final candidates for the position in February of 1985, yet was chosen for the position over non-Asians.

A thorough review of Ku's December 10, 1985 evaluation or "Performance Appraisal" reveals that, while dissatisfied with Ku's performance to date, Cole took great pains to detail a three month action plan in which specific projects were assigned to Ku to be completed by specific dates. While the effect of the census/cost reduction program prevented Ku from addressing these projects, their presence nonetheless indicates an intent to retain Ku for the immediate future. If Ku's conspiracy theory is to be

given credence, it is more likely that such an intent would not have been made manifest in the evaluations.

Furthermore, although there is no evidence that Ku was given negative feedback prior to the December 10, 1985 evaluation, Ku himself admits that he was aware that he had not completed assignments in a timely manner. See, e.g., Ku Deposition, at 129.

Lastly, Ku takes issue with the substance of the evaluation. The evaluation, in short, states that Ku had completed only three minor projects, had failed to demonstrate the requisite ability to conduct complex advanced programs, and had required too much supervision by Cole. Ku, by affidavit, contends that "[t]hese criticisms are so inaccurate and unjust as to indicate that they are in fact a mere pretext for the racial discrimination which Allied engaged in terminating my employment." Ku Affidavit, at Paragraph 6. Ku's protestations and assumptions of evil motives do not amount to the objective evidence necessary to create a genuine issue regarding a

material fact, and thus are not sufficient to withstand summary judgment.[2]

Even assuming that Ku was able to make out a prima facie case, Allied has articulated legitimate, non-discriminatory reason for its actions. Biron, by way of affidavit, states that in connection with the census/cost reduction program he was responsible for identifying positions in his department which could be eliminated. Ku's position was so identified for the following reasons: his position was the most recent addition to the operation, the operation had

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[2]In a memorandum filed on July 15, 1988, and labeled "Plaintiff's Summary on Defendant's Racial Job Discrimination," Ku states the following:

> I believe that Mr. Duffy used the Census/Cost program as a pretext to get rid of me so that he would have all "white" under him. On December 10, 1985, Duffy ordered Mr. Cole to write out a poor performance with harsh comments and rated me a 4 without my presence (I was told be Cole afterwards).

Memorandum, at paragraph 4.

The assertions and accusations contained in this excerpt are not presented by way of affidavit, and will not be considered by the Court.

functioned effectively before the position came into being, Ku failed to make a significant contribution to the overall operation due to his unsatisfactory performance, and Ku's need for supervision prevented Cole from addressing other concerns, thus the elimination of that supervisory responsibility would be beneficial.

Having articulated such reasons, the burden again shifts to Ku to demonstrate pretext. Ku "may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proferred explanation is unworthy of credence." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

Ku's attempt to show pretext consists of the protestations and conclusory allegations discussed above. While Ku may believe, and may be correct in believing, that his evaluation was inaccurate and unfair, there is nothing to indicate that any inaccuracy or unfairness is the product of discriminat-

ory intent. Moreover, it was not Ku's performance alone that persuaded Biron to eliminate his position. The newness of the position and the proven ability of the department to function effectively in its absence were also factors. Finally, it belies logic to think that Allied would hire Ku over non-Asians in February only to discharge him because of his race in December.

"[S]peculation is not sufficient to defeat a summary judgment motion." Ash v. United Parcel Service, Inc., 800 F.2d 409, 411-12 (4th Cir. 1986).

> [W]hen an employer makes an convincing showing that it discharged an employee for non-discriminatory reasons and the discharged employee introduces no evidence that the non-discriminatory reasons proferred by the employer are pretextual and no evidence from which an inference of pretext can be rationally drawn, summary judgment for the employer is appropriate.

Mack v. W. R. Grace Co., 578 F.Supp. 626, 631 (N.D. Ga. 1983), cert. denied, 105 S.Ct. 62, reh'g denied, 105 S.Ct. 578 (1984).

Summary judgment in favor of the defendant will be granted. An appropriate Order shall issue.

/s/James R. Spencer
UNITED STATES DISTRICT JUDGE

Date: JUL 20 1988

STATUTE AND RULE PROVISIONS

TITLE 42, UNITED STATES CODE

42 U.S.C. § 2000e-2. Unlawful employment practices

Employer practices

(a) It shall be unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

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42 U.S.C. § 2000e-5. Enforcement provisions

Power of Commission to prevent unlawful employment practices

(a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc., filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and

promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as

promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

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Time for filing charge; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from

such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charges shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occured, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

Civil action by Commission, Attorney General, or person aggrieved; preconditions, procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or

political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such a charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the

alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes

of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over the proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to

such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then

designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; limitation on judicial orders

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate,

which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such an individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

Appeals

(j) Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

Attorney's fee; liability of Commission and United States for costs.

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 56. Summary Judgment

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(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a

declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

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(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the

motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.